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SENSITIVE

SIPDIS

STATE FOR EAP/MTS, EAP/EP, AND EB/IFD  
DEPARTMENT FOR EEB/TPP/MTA/IPC  
STATE PASS USTR FOR BWEISEL, RBAE AND KEHLERS  
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USDOC FOR 4430/ITA/MAC  
USDOC PASS USPTO  
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SUBJECT: Philippines: 2009 Special 301 Report

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¶1. (SBU) Summary. Embassy recommends retaining the Philippines on the Special 301 Watch List. Improvements to intellectual property protection over the past year include an executive order creating intellectual property units in law enforcement agencies, increasing seizures by the Optical Media Board arising from a supplemental enforcement budget received mid-year, and increased seriousness about unauthorized camcording of films. Several longstanding issues remain of concern and merit increased government attention in the coming year. Retaining the country on the Special 301 Watch List will signal our recognition of the country's work and reward those responsible for progress while maintaining the leverage that has been responsible in some part for this progress and will be crucial as we work for greater progress. End summary.

¶2. (U) This report is divided into three sections: Part I covers the Philippine government's progress on IPR protection, Part II describes areas that warrant the government's attention, and Part III explains the thinking behind our recommendation.

Part I: GRP Progress on IPR Protection

President Arroyo Creates IPR Divisions in Executive Agencies  
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¶3. (U) The most importance advance on intellectual property rights took place in June, when President Arroyo issued Executive Order 736, institutionalizing permanent units to intensify the protection of intellectual property rights in law enforcement agencies under the National Committee on Intellectual Property Rights. Members of the Committee include the Departments of Justice, Interior and Local Government, Bureau of Customs, National Telecommunications Commission, National Bureau of Investigation, Philippine National Police, Optical Media Board, National Book Development Board, and the Bureau of Food and Drugs.

¶4. (SBU) Executive Order 736 converts the Intellectual Property Unit of the Bureau of Customs into a permanent administrative division, and creates similar units within the other members of the National Committee. The establishment of a permanent IPR unit in the Bureau of Customs has been a long-standing recommendation of the USG, but the GRP did us one better by establishing these units in all the agencies involved with IPR. We believe Executive Order 736 will raise the profile of intellectual property rights protection

throughout the executive branch.

#### Supreme Court Orders Development of New Rules for IPR Cases

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15. (SBU) The Supreme Court Chief Justice has ordered the development of new rules to govern IPR cases. Although he originally ordered that they be submitted in draft by the end of the first quarter of 2009, we expect (as always here) delay. We understand that continuous trial, sampling of evidence, and dedicated, specialized courts are all under discussion. Any of those ideas could make an important contribution to the weak follow through of IPR cases in the judiciary.

#### Enforcement by the Optical Media Board Increasing

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16. The sextupling of the enforcement budget of the Optical Media Board is increasing enforcement against pirates of movies, software and music. The Optical Media Board has traditionally suffered from very low budgets. Congress appropriated only PHP 1 million (about \$20,000) for enforcement operations in 2008. Acting on a request by Post and USTR, the office of the President provided an addition PHP 5 million from funds under presidential discretion, which enabled the Board to conduct operations more aggressively beginning in December. That end-of-the-year surge pushed seizures of optical disks to over 5.1 million in 2008 valued at \$36 million, compared to 4.7 million disks in 2007. The OMB carried out 1,820 inspections over the course of 2008. As the presidential decision came late in the year, the increased budget was not reflected in the 2009 budget, so supplementary funding will be needed again this year, but the OMB already has made a good start in enforcement for this year based on

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that funding, which has not yet been completely expended.

#### Search Warrants Holding Up

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17. (SBU) The OMB has improved the quality of its legal office resulting in warrants that survive challenge. In the past, many of its search warrants were quashed on appeal. This year, none of the eleven warrants it obtained were overturned. The work of the Board is starting to show signs of being better integrated with that of the Philippine National Police and the National Bureau of Investigation. The agencies have cooperated on raids outside Metro Manila, where the Board is not yet able to maintain large numbers of agents, and have cooperated on preparing cases for prosecutors to file.

#### "Flicker Piracy"

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18. (U) The House of Representatives passed an Anti-Camcording Act (House Bill 5699) in 2008, but the Senate has not yet taken the counterpart bill up for debate. Cinema chains have begun to take action on this issue as well. The Shoe Mart chain of malls (the largest operator of cinemas in the country) stopped over 200 people who were attempting to record films, and other chains nationwide run announcements before films asking viewers to alert management if they see patrons use recording devices. "Flicker piracy" is a particular problem in the Philippines because movies are shown in English without subtitles, yielding raw footage that is easier for movie pirates to edit into illegal disks for sale worldwide. The courts have never ruled clearly whether the Intellectual Property Code, as currently written, outlaws camcording. In 2008 several municipalities in the Manila area passed ordinances banning camcording, but they impose fines much smaller than what the Anti-Camcording Act proposes.

#### Enforcement by the Philippine National Police and National Bureau of Investigation

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19. (U) Enforcement actions by the police and National Bureau of Investigation fell off in 2008. In 2008, the Anti-Fraud and

Commercial Crimes Division of the Philippine National Police conducted 29 operations, served 141 search warrants, made 14 arrests, filed 6 cases, and made seizures worth more than \$5.7 million (vice 241 search warrants, 59 arrested, 28 cases filed, and \$9 million in seizures in 2007). Police carried out enforcement actions against internet cafes in Metro Manila, Cebu, and Davao City cracking down on the use of illegal software. The Division has undergone several changes of leadership over the past 18 months, but it appears that the new division chief may serve a full tour of duty which should make the division more effective.

¶10. (U) In response to Executive Order 736, the Director General of the National Police issued a Letter of Instruction establishing procedures for dealing with IPR cases. Among new initiatives resulting from this letter, IPR officers will be designated in provinces and municipalities, the Commercial Crimes Division will coordinate all IPR cases, and the National Police Academy will develop a course on IPR for all new officers.

¶11. (U) The Intellectual Property Rights Division of the National Bureau of Investigation served 207 search warrants (down from 310 in 2007), filed charges against 270 individuals (versus 423 the year before) and seized goods worth more than \$9 million during 2008, an increase from \$6 million in 2007. The Bureau, with 10 agents based in Metro Manila, conducted raids against retailers, call centers, internet cafes, construction and engineering design firms, as well as business establishments using unlicensed copies of computer software. These high-profile raids were conducted in Luzon--Metro Manila, Valenzuela City, Batangas Province, Pangasinan Province; and Visayas--Iloilo, and Bacolod, and Cebu.

#### Bureau of Customs Enforcement

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¶12. (SBU) The Intellectual Property Unit of the Bureau of Customs has been a small ad-hoc group, with no permanent personnel or

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budget. Executive Order 736 made the Unit a permanent division of Customs. The Unit made important seizures of trademark-infringing goods from China and Malaysia during the year, including a wide variety of items. It confiscated pirated DVDs, counterfeit cell phone accessories, bags, shoes and apparel, cigarettes, and automobile parts. Overall, the Unit made 38 seizures worth about \$16 million in 2008, compared to 34 seizures worth \$22 million in ¶2007.

#### The Intellectual Property Office Efforts

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¶13. (U) Executive Order 737, signed in mid-2008, established the Intellectual Property Research and Training Institute within the Intellectual Property Office as the country's center of education, training and research on intellectual property, modeled on the Global Intellectual Property Academy of the U.S. Patent and Trademark Office. In 2008, the Institute conducted 11 courses, with about 420 participants, including courses in patents and patentability, patent drafting, nanotechnology and biomedical engineering. In January 2007, the Office signed a Memorandum of Understanding with the United States Patent and Trademark Office that aims to improve the intellectual property protection system through information sharing and capacity building. The Office submitted a work plan under the memorandum in 2008, and the first major training event under the accord took place in March, 2009.

#### Part II: Areas for Improvement

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¶14. (SBU) Despite the accomplishments listed above, the IPR regime of the Philippines continues to be grossly inadequate. It suffers from many of the weaknesses which afflict the Philippine government and economy more broadly, as well as some issues particular to IPR. Perhaps the most serious problem is the inefficient, ineffective, and sometimes corrupt judicial system. Some issues in the legal regime for IPR also concern us. Finally, there are several opportunities to take advantage of positive trends in the GRP regime

which we want to highlight.

#### Prosecution and Punishment

¶15. (SBU) The lack of prosecutions and convictions of IPR violators continued to be the biggest weakness in IPR enforcement this year. A year that saw 562 search warrants issued and \$73 million in seizures produced only three convictions, all in cases that were several years old.

¶16. (SBU) Justice's backlog of unresolved IPR cases, which previously approached 1,000, fell dramatically this year to around 180 cases, mostly due to the dismissal of dormant cases and others that were resolved out of court (the Philippine judicial system allows for out of court financial settlement between rights owners and pirates, and this is not uncommon). Contacts in the Department of Justice have told us they worry that the number will simply expand again if systemic issues are not addressed in order for courts to bring cases to conclusion more quickly.

¶17. (SBU) The failure of the Department of Justice to prosecute IPR cases to conclusion is just one aspect of a weak criminal justice system in the Philippines. Only a small fraction of trials result in convictions. Procedural rules on appeals afford defendants many opportunities to delay the progress of cases, and judges across the system do not press trials to speedy conclusions. Progress on a host of issues that interest the USG are contingent on improvements in the judicial system, and significant USG resources are being invested in efforts to help the Philippines improve its judicial system.

¶18. (SBU) As reported para 5, the Chief Justice of the Supreme Court has ordered that new rules be developed for IPR cases. Post is following this initiative and offering suggestions with an eye to improving the system.

#### The Legal Regime

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¶19. (U) The Philippine Congress has yet to pass legislation amending the Intellectual Property Code to incorporate the provisions of the World Intellectual Property Organization Copyright Treaty and the Performances and Phonograms Treaty. Bills have been introduced in both houses of congress to implement the Treaties but neither chamber has yet taken up the subject.

¶20. (SBU) Legislation intended to reduce the prices of prescription drugs passed both the Senate and House in April, with President Arroyo signing it into law in July. In November, the Intellectual Property Office and the Department of Health issued their respective implementing rules and regulations. Although some objectionable IPR provisions of the draft legislation were removed before passage, the law includes limitations on the patentability of "new uses" for pharmaceuticals, international patent exhaustion and liberalized rules for compulsory licensing. The legislation also includes several objectionable provisions unrelated to IPR protection, such as price controls, and other provisions which provoke the ire of the pharmaceutical companies, such as parallel imports.

#### Cable Piracy

¶21. (SBU) The illegal retransmission of pay-television signals continues to be a problem in the Philippines, especially outside Manila. The industry reports that its losses to piracy in the Philippines were up by 11% this year. In rural areas, some smaller regional companies take broadcast signals, often using illegal decoders, and redistribute them to customers without payment to rights-holders.

¶22. (SBU) Nevertheless, there were pockets of progress on cable piracy. Philippine Justice Secretary Raul Gonzalez twice repudiated his 2007 ruling that commercial broadcasts were not covered by

copyright laws, and reinstated criminal copyright infringement charges against Estrellita Tamano, owner of an alleged pirate cable company in Cotabato City. The trial has not yet begun, and the Department of Justice continues to seek a change of venue to Manila.

Publicity from the Tamano case may have led several smaller companies to seek to settle accusations of signal piracy that the Cable and Satellite Broadcasting Association of Asia has made over the past several years, though settlements have not been reached, as yet.

#### Notorious Markets

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¶23. (SBU) There remain many places in the Philippines where pirated and counterfeit merchandise is openly sold. In Manila, the most notorious are in street stalls in the neighborhoods of Quiapo and Binondo. Several shopping malls openly sell counterfeit goods, including Makati Cinema Square, 168 Mall, and Greenhills Shopping Center. An Executive Order of November 17, 2006 establishes landlord liability for tenants who sell pirated merchandise, though no landlords have yet been prosecuted for intellectual property violations.

#### Ongoing Initiatives

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¶24. (U) The GRP has yet to issue implementing rules and regulations for the Executive Order establishing IPR units in most of the agencies. While the National Police is out in front on this issue, it will be important to get these rules out and to provide budgets and, in some cases, hire personnel, to take advantage of the new institutions.

¶25. (SBU) For the past two years, Optical Media Board Chairman Manzano has campaigned for improvements to the Optical Media Act that enumerates the Board's powers. The jurisdiction of the board should be expanded to include mobile device piracy, which is becoming a significant problem in the Philippines.

#### Part III: Post Recommends Retention on the Special 301 Watch List

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¶28. (SBU) The Embassy and the GRP both recognize that the Philippines still has a long road to travel before its IPR regime

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will meet international standards. That said, our GRP interlocutors are working hard at improving the IPR regime of their country and have made real progress in dealing with long-term issues over the past year. They have also had to fight hard in some cases to defend against interests which seek to degrade protection.

¶29. (SBU) In deciding what action to take on Special 301 this year we believe it important that the interagency consider not only the progress to date, but the implications of this decision for the prospects for IPR protection in 2009. In that regard, it is important to understand the role Philippine IPR champions have played over the past year.

¶30. (SBU) Adrian Cristobal, the Director General of the Intellectual Property Office, went to the President several times to advance IPR. He got the new Intellectual Property Research and Training Institute established. He got the Executive Order establishing IPR units signed by the President, accomplishing one of our goals (the establishment of an IPR unit in Customs), and going well beyond it by establishing such units in all the other related agencies. Secretary of Trade Peter Favila interceded with the President to obtain extraordinary funding for the Optical Media Board allowing for the current ramp-up of operations there (again at our request, but at a level beyond what we had imagined possible). He intervened numerous times with the Secretary of Justice to obtain the decision reinstating the prosecution of politically well-connected cable pirates in Mindanao (para 22). This was a complex and politically hot issue. Eduardo Manzano continued his high-profile fight against disk piracy.

¶31. (SBU) We expect 2009 to be even more difficult than 2008. With presidential elections in 2010, the focus will be on cozying up to domestic constituencies. We have already seen what that means for IPR in the pharmaceutical pricing legislation. We will need our allies, and we will need them to be motivated.

¶32. (SBU) USTR and the International Intellectual Property Alliance, or IIPA, have received letters from Eduardo Manzano protesting inaccuracies in IIPA's submission for Special 301. The letters may be a bit humorous, a bit embarrassing, but they provide a demonstration of the personal "face" our interlocutors have invested in their efforts to improve IPR protection in the Philippines. We believe that a downgrade of the Philippines back to the Priority Watch List would demoralize our interlocutors and make progress in 2009 much more difficult to achieve.

¶33. (U) Equally important, we believe that an objective assessment of the Philippine efforts must conclude that, while the country did stumble in some areas, it took three steps forward for its two steps back. And the three steps forward were on long term initiatives, such as the institutionalization of IPR protections, which are crucial to resolving the serious, entrenched problems here.

Kenney